The Protection of Health Must Take Precedence: Testing the Constitutional State of Crisis in Luxembourg

Edoardo Stoppioni 2020-04-29T08:19:52

In times of neoliberalism, it is healthy hearing the Prime Minister Xavier Bettel of Luxembourg say that "the protection of health and life takes precedence over economic interests". But this declaration came in the context of the recourse to extraordinary emergency powers, on the day before the Government declared the "state of crisis" to face the Coronavirus situation. In Luxembourg, this tool to regulate emergencies has progressively found its path into the Constitution while elsewhere in Europe philosophers like Agamben or public law professors (like Paul Cassia or Olivier Beaud) argued that a constitutional state of emergency entails the paradox of "constitutionalising the absence of constitution". It is therefore important to reflect on the effects of the conjugation of these two discourses into the sanitary crisis and their effect on democracy and human rights protection.

A Historical Crescendo of Emergency Powers

The legal tool providing for the state of emergency in Luxembourg has a long history, as the sociologist Renée Wagener clarified. Already in 1915, the Law on State of Emergency (*Noutstandsgesetz*) authorized the Government to take urgent measures without parliamentary procedure, with the only duty to inform the Chamber of deputies. This particular procedure led to the adoption of 618 measures before 1935, 274 of which concerned measures taken during the war (mostly to ensure supply). The perimeter of the emergency powers kept expanding between 1935 and 1939. With the up-coming war, their temporal limitation was suspended so that the Government could postpone elections during the war. The sociologist saw in the normalization of this culture of emergency, with very few criticisms against it, one of the fundamental factors for the limitation of the effectiveness of parliamentarianism, the aborted attempts to generalize some voting rights beyond nationality and the strengthening of the conditions to obtain the Luxembourgish nationality.

A second movement in the legal sedimentation of emergency powers under Luxembourg law deals with its progressive constitutionalization. In 2004, as a reaction to the anguishes of 9/11 and without real political attention, it was decided to introduce an emergency regime in the Constitution. This regime had evolved progressively after the Second World War: a law enabling the Government was needed (*Habilitatiounsgesetz*), it had to be renewed every year (even if the parliamentary practice ritualised this renewal at every session of December with reduced attention paid to it) and its scope of application was generally limited to international crises and monetary issues. This practice translated into constitutional terms in the revised Article 32 of the Fundamental Law of the Grand Duchy

(originally dating of 1868), establishing an *état de crise* the scope of application of which was indeed limited to international crises and allowed the executive to take urgent measures, derogating from in force legal provisions, in all matters and the validity of which was limited to three months.

As a reaction to the terrorist attacks in Paris in November 2015, the president of the Luxembourg socialist parliamentary group Alex Bodry introduced a revision proposal to expand the scope of this constitutional provision, which resulted in the current Article 32(4). Few voiced their preoccupation against the generalisation of a discourse according to which security needed to be stronger for (or at the expenses of) liberty. Among political parties, *Déi Lénk* denounced that a parliamentary Chamber that was constantly struggling to update an archaic constitutional charter was now going to pass such reform without even reflecting twice on its dangers. The Council of State, which after the *Procola* case before the ECtHR has only advisory functions, has also been very critical of the text: the proposal conveyed the "erroneous signal according to which the traditional rules of the *État de droit* were not enough to maintain public order and risked to convey the feeling of passing from an imperative of civil liberties and fundamental rights protection to the safeguard of public security" (p. 9). The preoccupations were all the more justified in light of the tendency of the political discourse to enlarge *ad libitum* the field of application of what had to be considered a crisis. While Alex Bodry had suggested to use the tool to address the ongoing migration crisis, Article 32(4) was used during the 2008 financial crisis to save the Dexia bank.

Now the text codified a certain enlargement of the notion, allowing for declaring a state of crisis in case of "international crisis, real threats for the vital interests of the whole or one part of the population or imminent danger resulting from serious harm caused to public security". There are some constitutional boundaries to the possibilities of action of the executive power. Indeed, according to the text, the urgent measures must be "necessary, adequate and proportionate to their objective", they should respect the Constitution and international treaties (that, interestingly enough, have a supra-constitutional status in the Luxembourg legal order), and must be limited in time (ten days, renewable for 3 months with prior authorisation of Parliament). Moreover, the Constitution foresees a general sunset clause: all measures taken on the ground of Article 32(4) would cease to have effect at the end of the state of crisis. According to Luc Heuschling, those boundaries would nevertheless be fundamental as they can be invoked before a judge. No judicial decision in this respect is so far to be found in the database of the Ministry of Justice.

With this deafening political silence in the background, the strongest criticisms came from civil society. Frank Wies addressed the problematic reflex to transpose to the Luxembourgish context French measures, without questioning if less intrusive measures for the democratic spectrum did not already exist. Véronique Bruck, who had strongly advocated for the need to strengthen the Constitution in terms of fundamental rights notably by introducing a *pro homine* clause, lamented eloquently the introduction of an exogenous transplant to the anatomy of the Constitution, with illusory guarantees and a serious impact for the most vulnerable, calling for a

suppression of Article 32(4). But here we are: Luxembourg is facing the Coronavirus crisis with this powerful constitutional tool.

The Legal Morphology of the State of Crisis

The legal architecture of the Luxembourg reaction to the Coronavirus crisis is, at least, threefold. First, needing to act rapidly, the Minister of Health Paulette Lenert adopted a decree (*arrêté ministériel*) on 16 March 2020 restricting the freedom of movement, closing public establishments, all commercial activities and organising communications with hospitals and essential services. The most interesting concerning this decree is its legal basis: the Minister had recourse to the Law of 25 March 1885 "*on measures against the introduction and spread of contagious diseases*", Article 1 of which allows the member of the government in charge of public health to take all necessary measures to prevent the spread of a pandemic. The law was used 35 times since: against cholera in the 19th century, rabies in the 1960s, as well as swine flu in 2009 when it was the legal basis to create treatment centres to support the overwhelmed hospitals.

Second, according to Alex Bodry, the father of the current physiognomy of Article 32(4), the state of crisis was a needed legal follow-up for more "legal certainty". Indeed, the executive activated the state of crises under Article 32(4) of the Constitution with the Grand Duke's Regulation of 18 March 2020, replicating and expanding on the previous decree. Following the text of the Constitution, it is the Grand Duke who declares the crisis situation: this is only one of the examples of the "*ambiguities*" of the constitutional language according to Luc Heuschling, as in reality it is the Government that exercises the executive power alone in case of crisis.

Third step, after the ten days' delay, it is the Parliament that needs to extend the state of crisis, as per the third sentence of Article 32(4). The Law of 24 March 2020 operated this prolongation in a very automatic way with two articles: the first declared the extension of the Grand Duke's Regulation for three months and the second the immediate entry into force from the publication. Equally laconic is the *avis* of the *Conseil d'État*, considering that the length of the extension pertains to the exclusive appreciation of the Chamber. The Parliament followed the proposal of the socialist *rapporteur* Mars di Bartolomeo who defended the necessity for a maximal extension of 3 months as an answer to the "most serious crisis that occurred in Luxembourg since the Second World War".

Institutions like the judiciary, have generally kept functioning but with a highly reduced service. A Grand Duke's regulation of 25 March suspending procedural time limits set the principle according to which hearings were re-scheduled, apart for few cases that are strictly enumerated; its somewhat confused and sibylline provisions had to be clarified subsequently on April 1st. Restrictive measures have been adopted notably concerning all visits to the penitentiary centre, while the ADR party considered that less restrictive solutions were conceivable. As for now, no judicial decisions have directly addressed the pandemic. In a pending case before the Administrative Court of Appeal, a migrant held in prison for his illegal situation in Luxembourg invoked the COVID-19 situation as a reason for the impossibility of

his return to Tunisia and asked on this basis to be set free. The appellate judges will have to take into account the COVID-19 situation, as a fact, in their proportionality review of the necessity of detention.

Risks and Criticisms

If we read the current sanitary crisis in the light of the debates concerning the constitutionalisation of the state of crisis, several points stand out for reflection. On 17 April 2020, the *Luxemburger Wort* has collected a series of articles focusing on the way the opposition analysed the Government's Coronavirus politics. The different parties supported the action of the government and it is a common opinion that the reaction of the Ministry of Health was laudable and effective. Nevertheless, some doubts remained open.

Contrary to the ongoing debates in France where "*carence*" seems to be the "essential grammar to think the relations between the responsibility of the public power and the sanitary crisis" (S. Hennette-Vauchez), the lack of reactivity plays a minor role in Luxembourg. Only David Wagner (*Déi Lénk*) stressed that the first parliamentary questions arose as early as February. The core of the criticisms dealt more with a pure political responsibility than with an administrative law one. At the heart of the discussions lies the lack of *clarity*.

The lack of clarity would concern above all the exit-strategy, concerning the distribution of masks and the use of tests for the population. This first point was recently addressed in an urgent parliamentary question of the Pirate party, pointing out that masks have been sent directly to residents at their address in Luxembourg but what about homeless people? Moreover, this exit-strategy would suffer from problems coming from inequalities. It is not clear why big hardware stores can now re-open and smaller businesses cannot seize the same opportunity. Similarly, risks of inequalities are particularly intense for the situation of distance learning

Nevertheless, the core of the worries concerned the situation of the most vulnerable individuals during the crisis. As of the end of March, the president of the *Commission consultative des droits de l'Homme* wrote an open letter to the Prime Minister to show support in relation to the measures taken. While the right to life is an essential preoccupation for the Government, the heart of his reflection lies on the injustices that can emerge for the marginalised.

The impact of the state of emergency is stronger at the margins of society and the governmental action has to take into serious account its relation to solidarity. As David Wagner pointed out, it is certainly not enough to hide behind a rhetoric of solidarity not to face the serious burdens of the sanitary system or the difficulties of the housing situation in Luxembourg. What is more, extended powers risk having as side effect discouraging solidarity, as it was the case for the NGO *Stroossenengelen* (Angels of the streets) that has been helping homeless people all over Luxembourg. On 29 March, the police have applied fines of 145 euros to the volunteers for non-respecting the rules on containment and social distancing. The Minister of Family suggested the NGO to stop its activities as the Government has allegedly put in

place its best efforts to help the homeless with means that are necessarily more important.

What is more difficult to evaluate for now is the impact that the state of crisis measures will have on the future. The culture of emergency can extend far beyond the three months of the constitutional sunset clause. A worrying example is the recent measures allowing increasing the working time from 48 hours per week to a maximum of 60 hours, without a serious agreement with trade unions. We can only but agree with Véronique Bruck: the state of crisis is a Pandora box that, once opened, is difficult to close. Now that Luxembourg has solidly anchored this culture in its Constitution, the Parliament and the judges need to remain alert and defend the rule of law.
